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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 BRENT NICHOLSON, *et al.*,  
9 Plaintiffs,  
10 v.  
11 THRIFTY PAYLESS, INC., *et al.*,  
12 Defendants.  
13

No. C12-1121RSL  
ORDER ON REMAND

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15 This matter comes before the Court on “Defendants’ Motion for Order in Response to  
16 Remand.” Dkt. # 176. The Ninth Circuit Court of Appeals remanded this matter to the  
17 undersigned for (a) further consideration of plaintiff Brent Nicholson’s personal liability for  
18 attorney’s fees under the lease agreements he signed on behalf of the LLC plaintiffs and (b) a  
19 determination regarding defendant Thrifty’s entitlement to prejudgment interest on its  
20 counterclaim.<sup>1</sup>

21 **A. Personal Liability for Fee Award**

22 For the reasons set forth in the Court’s “Order Denying Motion to Release Funds,” the  
23 Court finds that Nicholson is personally liable for attorney’s fees under the lease agreements  
24 even though he was not a party to the contracts. All of the plaintiffs, including Nicholson,

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26 <sup>1</sup> The Court has not reevaluated Nicholson’s personal liability for any award of prejudgment  
interest. That issue was finally resolved against Nicholson on appeal. Dkt. # 161 at 8.

ORDER ON REMAND

1 asserted a breach of contract claim against defendants based on the lease agreements. Dkt. # 1-2  
2 at 29. Given his relationship to and control over the plaintiff LLCs, Nicholson's contract claim  
3 was colorable and, had he prevailed on that claim, he would have been entitled to a fee award  
4 under the terms of the contract.

## 5 **B. Prejudgment Interest**

6 Plaintiffs do not dispute that the overpayments made to No One to Blaine, LLC, resulted  
7 in a liquidated claim or that prejudgment interest is generally awarded on such claims in order to  
8 compensate for the "use value" of the money from the time of loss to the date of judgment. See  
9 Hansen v. Rothaus, 107 Wn.2d 468, 472-73 (1986); Hadley v. Maxwell, 120 Wn. App. 137,  
10 141-42 (2004). The parties disagree, however, regarding the appropriate interest rate that applies  
11 in this case, the date upon which interest began to accrue, and whether a reduction should be  
12 made based on equitable considerations.

13 Interest on judgments in Washington is governed by RCW 4.56.110, which provides five  
14 different interest rates depending on the nature of the claim upon which judgment is entered.  
15 "[J]udgments founded on the tortious conduct of individuals or other entities" accrue interest at a  
16 rate tied to the published prime rate of the federal reserve system. RCW 4.56.110(3)(b). In this  
17 case, that rate is 5.25%. Judgments founded on contracts that do not specify an interest rate  
18 accrue interest at 12%. The issue, then, is whether the \$103,500 judgment on Thrifty's  
19 counterclaim was founded on a tort or a contract theory.

20 Having reviewed the pleadings and relevant motions in this matter, the Court finds that  
21 Thrifty's counterclaim and the resulting judgment were based in tort. Thrifty's counterclaim  
22 avoids labels and is based solely on allegations of a contractual obligation to pay rent through  
23 August 31, 2010, mistaken payments thereafter, and plaintiffs' failure to repay or reimburse the  
24 amounts mistakenly paid. Dkt. # 17 at 22-23. In its motion for summary judgment, Thrifty  
25 argued that plaintiffs' "wrongfully retained" the overpayments. Dkt. # 88 at 35. These  
26 allegations and arguments mirror a conversion claim, where "a person intentionally interferes

1 with chattel belonging to another, either by taking or unlawfully retaining it, thereby depriving  
2 the rightful owner of possession.” Alhadeff v. Meridian on Bainbridge Island, LLC, 167 Wn.2d  
3 601, 619 (2009). Thrifty did not and could not identify a provision of the lease agreement that  
4 was breached, and the cases on which it relied for the relief requested are based on various tort  
5 causes of action. U.S. Bank v. Henderson, 2007 WL 2492738, at \*2-3 (W.D. Wash. Aug. 29,  
6 2007) (overpayment for stock certificate during merger gave rise to a claim based on the  
7 principles “that no one ought unjustly to enrich himself at the expense of another” and that a  
8 party who “has received money which in equity and good conscience should have been paid to”  
9 another “ought, by the ties of natural justice, to pay it over.”) (quoting Seekamp v. Small, 39  
10 Wn.2d 578, 584 (1951)); Davenport v. Wash. Educ. Ass’n, 147 Wn. App. 704, 721 (2008)  
11 (evaluating common law claims of conversion and restitution). Thrifty’s counterclaim was based  
12 on erroneous payments not required by the contracts: plaintiffs’ liability arose when it was  
13 unjustly enriched and/or failed to return what, in equity and good conscience, should have been  
14 paid over. Thus, the 5.25% interest rate applies.


15 Prejudgment interest normally begins to accrue at the time of the loss in order to  
16 compensate the injured party for the use value of the wrongfully withheld money. Plaintiffs  
17 argue that the loss occurred all at once in May 2011, but there is nothing in the record to support  
18 such speculation. The lease agreements, the course of conduct between the parties, and  
19 plaintiffs’ accounting records show that rent was paid monthly in \$11,500 installments, not in a  
20 lump sum in May 2011.

21 Finally, plaintiffs argue that the award of prejudgment interest should be reduced based  
22 on equitable considerations, primarily the facts that the overpayment was the result of Thrifty’s  
23 unilateral mistake and that Thrifty did not make a demand for repayment until it filed its  
24 counterclaim on August 17, 2012. Even if plaintiffs arguably did not convert Thrifty’s property  
25 until demand was made, plaintiffs were unjustly enriched from the moment they received the  
26 payments. Despite the chaos of the real estate market in the relevant time frame and the

1 complexity of the parties' business relationship, plaintiffs knew that the interim rent payments  
2 after August 2010 were not being used for any purpose that would benefit Thrifty (such as  
3 securing the Blaine property and/or building the retail space). Plaintiffs had stopped making  
4 payments on the loan in July 2010, negating any justification for the accepting and retaining the  
5 interim rental payments after the contractual obligation expired. The equities do not warrant a  
6 further reduction in the interest rate or the time over which interest must be paid.

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8 For all of the foregoing reasons, the Court finds that (a) Brent Nicholson is personally  
9 liability for attorney's fees under the lease agreements he signed on behalf of the LLC plaintiffs  
10 and (b) Thrifty is entitled to prejudgment interest on its counterclaim at the rate of 5.25% from  
11 the date of each overpayment. The Clerk of Court is directed to enter judgment in this matter in  
12 favor of defendants.

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14 Dated this 8th day of January, 2018.

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17 Robert S. Lasnik  
18 United States District Judge  
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